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No. 86 1885

FILED
MAY 26 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

JOHN C. SCARVACI,

Appellant,

v.

FREDERIC MATESTIC, et als,

Appellees.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JURISDICTIONAL STATEMENT

JOHN C. SCARVACI, pro se
910 East Calumet Road
Milwaukee, Wisconsin 53217
(414) 352-6467

QUESTIONS PRESENTED

I.

WHETHER THE SEVENTH CIRCUIT HAS ERRED IN AFFIRMING THE ORDER OF A LOWER COURT THAT HAS GRANTED ABSOLUTE IMMUNITY TO DEFEND - ANTS IN DIRECT CONFLICT WITH ARTICLE III OF THE UNITED STATES CONSTITUTION.

II.

WHETHER OFFICIALS ACTING IN THEIR OFFICIAL CAPACITY ARE EXEMPT IN ALL INSTANCES FROM PROVISIONS OF TITLE 42 U.S.C.A. #1983, THAT DENY IMMUNITY FROM LIABILITY FOR CIVIL RIGHTS VIOLATIONS.

III.

WHETHER THE SEVENTH CIRCUIT ERRED IN RE- FUSING TO CONSIDER A -MOTION FOR A WRIT OF ERROR-BECAUSE OF A PREVIOUS APPEAL.

IV.

WHETHER CITIES ARE IMMUNE TO FEDERAL CIVIL RIGHTS DAMAGE SUITS BROUGHT BY PEOPLE WHO BELIEVE THAT THEIR RIGHTS HAVE BEEN VIOL- ATED BY THE ACTIONS OF CITY OFFICIALS.

LIST OF ALL PARTIES

Pursuant to the rules of this court, the following is a list of the parties to the proceedings in the court below whose judgment is sought to be reviewed:

FREDERIC MATESTIC,
Assistant District Attorney

E. Michael McCANN,
District Attorney

MILWAUKEE COUNTY, WISCONSIN
William O'Donnell, Exec.Director

AARON E. GOODSTEIN,
U. S. Magistrate

THOMAS J. CURRAN
U. S. District Judge

FRANK H. EASTERBROOK,
Circuit Judge

KENNETH F. RIPPLE,
Circuit Judge

DANIEL A. MANION,
Circuit Judge

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See also Scheuer v. Rhodes, 416 US 232, 94 S Ct 1683

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See also Harlow v. Fitzgerald, 457 US 800, 102 S Ct 2727

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

No.

JOHN C. SCARVACI,
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FREDERIC MATESTIC, et als,
Appellees.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

OPINIONS BELOW

The United States Court of Appeals for the Seventh Circuit, issued a JUDGMENT ORDER entered on February 17, 1987, affirming the JUDGMENT ORDER of the United States District Court for Eastern Wisconsin, filed on October 22, 1987 and November 3, 1987.

A copy of the ORDER of the Court of Appeals denying a 'MOTION FOR RELIEF IN THE NATURE OF WRIT OF ERROR' is attached as Appendix A. A copy of the ORDER denying a 'MOTION FOR RECONSIDERATION OF ORDER DENYING WRIT OF ERROR' dated April 1, 1987, is attached as Appendix B.

A copy of the ORDER of the District Court, dated October 22, 1986, denying a 'WRIT OF ERROR CORAM NOBIS' directed to U.S. Magistrate Goodstein, is attached as Appendix C, and a copy of the ORDER denying reconsideration of the order is attached as Appendix D, dated November 3, 1987.

Appellant respectfully requests review of the Judgment Order of the United States Court of Appeals, entered February 17, 1987, and of the Judgment Order of the District Court which said Judgment Order affirmed.

JURISDICTION

Jurisdiction of this court is invoked pursuant to 28 U.S.C. 1252, to review the Judgment of the United States Court of Appeals, dated February 17, 1987, which is in conflict with 42 U.S.C. #1983, and Article III, Sec. 2 of the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, Section 2, provides in pertinent part:...but one state may sue another state or its citizens and the United States may sue a state, and the immunity of a state from suit does not protect state officers violating rights protected by the United States Constitution.

The 14th Amendment to the United States Constitution provides in pertinent part:... nor shall any state deprive any person of life, liberty, or property, without due process of law.

Title 42 U.S.C. #1983 provides; Every person who under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof, to the deprivation of any rights, privileges, or immunities secured by the Constitution...shall be liable to the party injured in action at law, suit in equity, or other proper proceeding for redress.

Wisconsin Criminal Statute 939.12
CRIME DEFINED
A crime is conduct which is prohibited by state law and punishable by fine or imprisonment or both.

Wisconsin Criminal Statute 939.23
CRIMINAL INTENT
1. When criminal intent is an element of a crime in chs. 939 to 948, such intent is indicated by the term 'intentionally' the phrase 'with intent to', the phrase 'with intent' or some form of the verbs 'know' or 'believe'.

2. 'Know' requires only that the actor believes that the specified fact exists.

4. 'With intent to' or 'with intent that' means that the actor either has a purpose to do the thing or cause the result specified or believes that his act, if sucessful, will cause that result.

5. Criminal intent does not require proof of knowledge of the existence or constitutionality of the section under which he is prosecuted or the scope of the meaning of the termms used in that action.

Wisconsin Criminal Statute 943.25
TRANSFER OF ENCUMBERED PROPERTY
1. Whoever, with intent to defraud, conveys real property which he or she knows is encumbered, without informing the grantee of the existence of the encumbrance is guilty of a Class E felony.

2. Whoever, with intent to defraud, does any of the following, is guilty of a Class E felony.

(a) Conceals, removes or transfers any personal property in which he knows another has a security interest; or

(b) in violation of the security agreement, fails or refuses to pay over to the secured party the proceeds from the sale of property subject to a security interest.

3. It is prima facie evidence of an intent to defraud within the meaning of sub. (2)(a) if a person with knowledge that the security interest exists, removes or sells the property without either the consent of the secured party or authorization by the security agreement and fails within 72 hours after service of written demand for return of the property, either to return it, or, in the event that return is not possible, to make full disclosure to the secured party of all the information he has concerning its disposition, location and possesion.

4. In this section 'security interest' means an interest in property which secures payment or other performance of an obligation; 'security agreement' means the agreement creating the security interest; 'secured party' means the person designated in the security agreement as the person in whose favor there is a security interest or, in the case of an assignment of which the debtor has been notified, the assignee.

STATEMENT OF THE CASE

The issues and facts of this case are as presented in the Decision and Order of the U. S. District Court, on case 84-C-752, herein attached as Appendix E, and also in the Order of of the U. S. Court of Appeals, No. 84-2728, attached as Appendix H.

Appellant Scarvaci has proceeded pro se only because of inability to acquire legal counsel. Several law firms and numerous individual attorneys, even those attorneys who were contacted throght the Lawyer Referral Service, declined to handle the case. No one was willing to become involved in this matter with the District Attorney's office.

Appellant had moved for summary judgment because Assistant District Attorney Matestic had clearly disregarded and contravened settled indisputable law, Wisconsin Criminal Statute 943.25, thereby losing his cloak of immunity under Federal Legislation Title 42 U.S.C.A. #1983. Under these circumstances, appellant claims that Magistrate Goodstein erred in granting absolute immunity to Matestic. It is apparent that the Appeals Court accorded respect to the evaluation of the case by the Magistrate and would not reverse the judgment.

The Court of Appeals, in its order dated February 17, 1987, Appendix A, denied appellant's 'MOTION FOR RELIEF IN THE NATURE OF WRIT OF ERROR', stating that appellant had already had an appeal. Appellant in his 'MOTION FOR RECONSIDERATION OF ORDER DENYING WRIT OF ERROR', cited the case of Monroe v. Pape, 365 U.S. 167, in which the Seventh Circuit granted certiorari, even after affirmance. Other cases where the writ of error coram nobis, did lie in proper cases include; Davis v. Packard, 33 US 312, 8 L Ed 957; Johnson V. Williams, 244 Ala 391, 13 So 2d 683; State v, Hudspeth, 191 Ark 963, 88 SW 2d 858.

On December 18, 1986, appellant had filed along with his brief of that date, a suggestion for an in banc consideration of the case, but there was no response from the court regarding the suggestion.

AUTHORITIES

In a seminal U. S. Supreme Court case, Ex parte Young, 209 US 123, 28 S Ct 441, it has been settled that the Eleventh Amendment provides no shield for a state official confronted by a claim that he had deprived another of a federal right under the color of state law, When a state officer acts under a state law in a manner violative of the Federal Constitution, he comes into conflict with the superior authority of the Constitution, and he is in that case stripped of his official representative character and is subjected in his person to the consequences of his individual conduct.

Title 42 USCA #1983 , n2743

IGNORANCE OF LAW

Qualified immunity cannot be utilized as defense to to claim of deprivation of civil rights where ignorance of indisputed law or disregard of such law is demonstrated. DOORES v. McNAMARA, D.C. Mo. 1979, 476 F. Supp. 987

Title 42 USCA #1983, n 2744
INTENT OR KNOWLEDGE

An official is immune if his motives are permissable and he has not violated constitutional rights established by settled, indisputable law; an official, even if he is acting in the sincere subjective belief that he is doing right, loses his cloak of qualified immunity if his actions contravene settled; indisputable law. Jackson v. State of Miss., C.A. Miss.1981, 644 F. 2d 1142, McKinley v. Trattles, C.A. Wis. 1984.

Title 42 USCA #1983, n 2745
NEGLIGENCE

Official conduct which negligently leads to violation of constitutional rights, is sufficient to overcome any qualified immunity official may have against civil rights liability. Briggs v. Malley, C.A.R.I. 1984, 748 F.2d, cert. granted, 105 S Ct 2654.

IMMUNITY OF CITIES

Cities are not immune to federal civil rights damage suits brought by persons who believe that their rights have been violated by the actions of city officials; Owen v. City of Independance, Mo. (445 U.S. 622).

IMMUNITY OF A GOVERNMENT OFFICIAL

The person suing a government official for violating his constitutional rights need not allege that the official committed the offending action maliciously or otherwise in good faith. It is up to the defendant official to raise that argument by defending himself with the claim that he acted in good faith and thus merits some immunity from the charge; Gomez v. Toledo (446 U.S.635)

City, judges, and city attorneys, were not immune from every type of relief in 42 U.S.C.A. civil rights action under all circumstances. Beaudett v. City of Hampton, 775 F.2d 1274, cert. denied, 106 S Ct 1475.

REASONS WHY APPEAL SHOULD BE GRANTED

I. Appellant claims that the seminal U.S. Supreme Court case, Ex parte Young, under Article III, Section 2, of the United States Constitution, is the controlling authority in determining the immunity of state officials. Cited on page 8, under Authorities.

II. Appellant cites on pages 8 and 9, under Authorities, sections n2743, n2744 and n2745 of Title 42 U.S.C.A. #1983, that state circumstances under which officials do not have immunity for civil rights violations.

III. Appellant cites several cases where the writ of error coram nobis was available, even after affirmance of a previous appeal. Page 7.

IV. Appellant cites on page 10, cases where cities and government officials are not immune from civil rights violations.

CONCLUSION

In conclusion, appellant states that he, without benefit of counsel, has presented this appeal as best he can, under the circumstances.

At no time through the proceedings in the lower courts was appellant afforded a hearing to plead his case. Also, at no time was any statement made in the lower courts, that the appellant had not been deprived of his rights and property.

Appellant has proven that under Article III of the U. S. Constitution, and Federal legislation, Title 42 U.S.C.A. #1983, the absolute immunity granted to the assistant district attorney was in error.

Appellant respectfully prays that this court grant the appeal to the United States Court of appeals for the Seventh Circuit to review its Judgment Order.

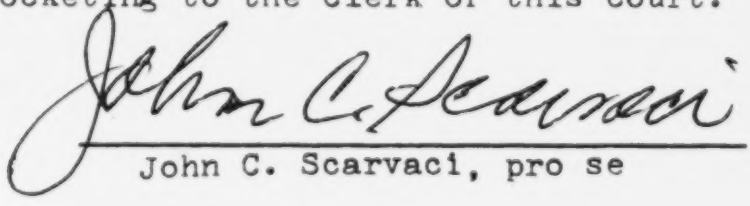
Respectfully submitted,

John C. Scarvaci

John C. Scarvaci, pro se
910 East Calumet Road
Milwaukee, Wisconsin 53217
(414) 352-6467

CERTIFICATE OF SERVICE

I, John C. Scarvaci, appellant, hereby certifies that he mailed three true and correct copies of the within Jurisdictional Statement to Corporation Counsel, Robert G. Ott at 901 North 9th Street, Milwaukee, Wisconsin, by ordinary mail, postage prepaid, and copies also to Federal Judge Thomas J. Curran and US Magistrate Aaron E. Goodstein at 517 East Wisconsin Avenue, Milwaukee, Wisconsin, and to 7th Circuit Judges, Frank H. Easterbrook, Kenneth F. Ripple and Daniel A. Manion at 219 South Dearborn Street, Chicago, Illinois, on the date of docketing to the Clerk of this court.



John C. Scarvaci, pro se

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

JOHN C. SCARVACI,
Plaintiff-Appellant

Feb. 17, 1987

v.

No. 86-2931

FRED MATESTIC, Assistant District Attorney, et al.,
Defendant-Appellees

Appeal from the United States District Court for the Eastern District of Wisconsin.
No. 84 C 752
Judge Thomas J. Curran

This matter comes before the court for its consideration upon the - MOTION FOR RELIEF IN THE NATURE OF WRIT OF ERROR - filed herein on December 22, 1986, by the pro se plaintiff-appellant. Petitioner has already had an appeal on the merits of this case. Therefore, the district court was correct in denying the petition for a writ of error. Accordingly, IT IS ORDERED that the district court's decision is affirmed.

Before: Easterbrook, Ripple & Manion, C.Js.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 86-2931

JOHN C. SCARVACI.
Plaintiff-Appellant

April 1, 1987

v.

FRED MATESTIC, Assistant District Attorney, et al.,
Defendant-Appellees

Appeal from the United States District Court for the Eastern District of Wisconsin. No. 84 C 752

Judge Thomas J. Curran

This matter comes before the court for its consideration upon the - MOTION FOR RECONSIDERATION OF ORDER DENYING WRIT OF ERROR- filed herein on March 3, 1987.

On consideration thereof,

IT IS ORDERED that said motion is DENIED.

Before: Easterbrook, Ripple & Manion, C.Js.

APPENDIX C

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

Oct. 22, 1986

JOHN C. SCARVACI,
Plaintiff

v. Case No. 85-C-752

FREDERIC MATESTIC, Assistant District Attorney, E. MICHAEL McCANN, District Attorney and WILLIAM F. O'DONNELL, County Executive of Milwaukee County,
Defendants

ORDER

Although originally commenced in this court, the above-captioned action was transferred to U. S. Magistrate Aaron E. Goodstein, with the consent of all parties to the action. On August 24, 1984, Magistrate Goodstein granted the defendants' motion to dismiss and denied the plaintiff's motion for summary judgment. The plaintiff's motion for reconsideration was denied on September 13, 1984.

The plaintiff appealed the order of dismiss- and order denying summary judgment to the United States Court of Appeals for the Seventh Circuit. On May 24, 1985, the Court of Appeals affirmed the magistrate's order. The plaintiff has now filed a motion for relief seeking a writ of error coram nobis directed to Magistrate Goodstein. In view of Federal Rule of Civil Proceedure 60(b), the court will consider that the plaintiff is attempting to appeal the magistrate's decision to this court.

The plaintiff's motion must be denied because he has already appealed the decision to the Court of Appeals. Having exercised this option under 28 U.S.C #636(c)(3) & (4), the plaintiff is now precluded from appealing the magistrate's decision to this court.

Accordingly,

IT IS ORDERED that the Plaintiff's motion

for relief in the nature of error coram nobis IS DENIED.

Done and Ordered in Chambers at the United States Courthouse, Milwaukee, Wisconsin this 22nd day of October, 1986.

Thomas J. Curran
U. S. District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

JOHN C. SCARVACI, Nov. 3, 1986
Petitioner,

Case No.
v. 84-C-752

U.S. MAGISTRATE AARON E. GOODSTEIN
Respondant.

ORDER

Although the plaintiff has moved for reconsideration of this court's order of October 22, 1986, he has offered no legal reason why the court's Order was in error. Accordingly,

IT IS ORDERED that the plaintiff's motion for reconsideration be and hereby IS DENIED.

Done and Ordered in Chambers at the United States Courthouse, Milwaukee, Wisconsin, this 3rd day of November 1986.

Thomas J. Curran
U.S. District Judge

APPENDIX E

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

JOHN C. SCARVACI,
Plaintiff,

v.

FREDERIC MATESTIC,
E. MICHAEL McCANN and
WILLIAM F. O'DONNELL,
Defendants.

Aug. 24, 1984

Case No.
84-C-752

DECISION AND ORDER

Plaintiff John C. Scarvaci filed this lawsuit pro se on June 11, 1984, alleging violations of his due process rights. Defendants are an assistant district attorney, the District Attorney and the County Executive of Milwaukee County, Wisconsin. The case was transferred to this court pursuant to 28 U.S.C. #636 (c).

Defendants filed a motion to dismiss under Rule 12(b)(6), Fed. R. Civ. P., in timely response to the complaint.

In reply, plaintiff has submitted a brief as well as other materials, mostly consisting of correspondence concerning his claim. In view of the submission of this outside material, the motion will be construed as one for summary judgment under Rule 56, as provided in Rule 12(b), Fed. R. Civ. P. Plaintiff has in fact filed a motion for summary judgment, purportedly based on the materials already filed.

Although plaintiff's complaint is sketchy, the added materials and brief have allowed the court to form an idea of the nature of his claim. In July of 1980, plaintiff retained an attorney to assist him in obtaining the return of some property allegedly transferred by one James F. Tall, property that was encumbered by a security interest held by the plaintiff. Eventually plaintiff filed a criminal complaint with the Consumer Fraud Division of the County District Attorney's Office alleging that

Mr. Tall had knowingly transferred secured property in violation of Wis. Stats. #943.25. The District Attorney's office did contact Mr. Tall on plaintiff's behalf but did not file criminal charges. When no action was taken on his complaint, plaintiff wrote to several state legislators. Queries from these legislators brought a response from the District Attorney's office that Assistant District Attorney Matestic had concluded that Proof of Intent was Lacking and that the case was not an appropriate one upon which to expend the resources of his office.

Plaintiff's complaint alleges that defendant Matestic's refusal to prosecute Mr. Tall resulted in the loss of his livelihood by denying him the means to re-enter the printing business. His complaint cites the Fourteenth Amendment to the United States Constitution and the Civil Rights Act, 42 U.S.C. #1983, as authorities for his suit, although

his brief in opposition to defendant's motion to dismiss specifies the Due process and Equal Protection clauses of the Fourteenth Amendment and Article I of the Wisconsin Constitution. Plaintiff names defendants O'Donnell ar and McCann in his complaint because they hold positions of authority over defendant Matestic but does not allege any specific acts or omissions on their part.

In support of their motion to dismiss, defendants assert that the doctrine of prosecutorial immunity shields them from liability for any of the actions they are alleged to have taken. In response, plaintiff asserts that the immunity doctrine protects prosecutors only when they are performing 'their sworn duty'. Plaintiff argues that defendants refusal to prosecute his criminal complaint violated their duty under Wis. Stats. #59.47 to prosecute all violations of Wisconsin criminal law. See also 25 Opp. Att'y Gen. 549, 557-558 (1936).

Prosecutorial immunity, like judicial immunity, is designed to permit officials acting in the public interest to exercise their authority independently and without fear of intimidation or embarrassment due to unfounded litigation. Imbler v. Pachtman, 424 U.S. 409, 423-424 (1976); Wickstrom v. Ebert, 585 F. Supp. 924, 929 (E.D.Wis.1984). Where the acts compained of are 'quasi-judicial' in nature, i.e. where the prosecutor acts in his capacity as an 'advocate' conducting litigation on the state's behalf, that immunity is absolute. Wickstrom, 585 F. Supp. at 930; Hampton v. Hanrahan, 600 F.2d 600, 631-632 (7th Cir.1979). See also Butz v. Economou, 438 U.S. 478,510-511(1978).

In arguing that defendants are not immune because they were violating a statutory 'duty' by not prosecuting his complaint, plaintiff fails to comprehend the natue of immunity as a defense.

Even if it is true that Wis. Stats. #59.47 places a duty on defendants to prosecute all cases where criminal conduct is apparent, it is the nature of that decision itself rather than the manner in which it is exercised that dictates the extent of the immunity that courts will afford to it. The decision not to prosecute a criminal case is a judgment made by a prosecutor in his role as the state's litigator. It is analogous to a decision to prosecute, and falls squarely within the range of absolute protected advocacy conduct. See Dohaish v. Tooley, 670 F.2d 934, 398 (10th Cir.) cert. denied, 459 U.S. 826 (1982); cf. Curry v. Jensen, 523 F.2d 387,388 (9th Cir. 1975), cert. denied, 423 U.S. 998 (1975) (decision to prosecute dog poisoning as misdemeanor rather than as felony is protected by absolute immunity.

In his complaint plaintiff cites the Fourteenth Amendment and the Civil Rights Act as bases for liability; in his response

brief to defendants' motion to dismiss he states that his case was brought under the Amendment and not the Act. This distinction is of no significance where the defense of immunity is properly asserted. Litigation based based directly on a constitutional amendment is not likely to be any less intimidating or embarrassing than that conducted under 42 U.S.C #1983. The same concerns that give rise to the doctrine of prosecutorial immunity thus apply in cases brought under the Fourteenth Amendment or the Civil Rights Act or, as is the case here and in Dohaish, under both. Cf. Harlow v. Fitzgerald, 457 U.S. 800, 818 n. 30 (1982).

An additional ground exists for dismissing defendant O'Donnell. Plaintiff names defendant McCann, the District Attorney, as the person 'under whom Mr. Matestic serves', and defendant O'Donnell, the County Executive, as the 'employer of the office of District Attorney.'

It is well established that liability for violations of civil rights may not be imposed on the basis of vicarious liability. Some allegation of personal conduct, either act or omission, is required. Adams v. Pate, 445 F.2d 105, 108 (7th Cir. 1971). While in some cases it may be appropriate at the pleading stage to infer such involvment from mere allegations of general supervisory authority, see,e.g., Duncan v. Duckworth, 664 F.2d 653, 655-656 (7th Cir. 1981), it is clear that no such inference is appropriate in the case of a county executive. Defendant O'Donnell's position in relation to the District Attorney's office is simply to remote to permit such an inference based on the allegations presented here.

IT IS THEREFORE ORDERED that defendants' motion to dismiss the instant complaint is hereby GRANTED, and that plaintiff's motion for summary judgment is hereby DENIED.

A judgment dismissing the complaint shall be issued forthwith.

Dated at Milwaukee, Wisconsin, this 24th day of August 1984.

BY THE COURT

AARON E. GOODSTEIN
U. S. MAGISTRATE

APPENDIX F

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

JOHN C. SCARVACI,
Plaintiff,

v.

FREDERIC MATESTIC,
E. MICHAEL McCANN and
WILLIAM F. O'DONNELL,
Defendants.

Sep. 13, 1984

Case No.
84-C-752

ORDER

On August 24, 1984, this court issued a decision, order and judgment dismissing the complaint in this action. Plaintiff has moved for reconsideration of that decision.

Plaintiff's complaint, filed pro se, alleged that the Milwaukee County District Attorney and an assistant of that office violated his right to due process of law by refusing to criminally prosecute someone who had knowingly transferred property encumbered by his (plaintiff's) security interest, in violation of Wis. Stats. #943.25.

The Milwaukee County Executive William O'Donnell was also named as a defendant. Defendants moved for dismissal on grounds that their decision not to prosecute was absolutely protected by the doctrine of prosecutorial immunity. It was on that very ground that this court dismissed the complaint.

Plaintiff raises no new issues regarding the merits of his complaint. He does, however, question the dismissal of his complaint without hearing or trial. He states that when he signed the form consenting to the transfer of his case to this court under 28 U.S.C. #636(c), he believed that he would thereupon be afforded the opportunity to appear before the Magistrate and plead his case.

The fact that plaintiff's complaint was dismissed summarily had nothing to do with the fact this court is a Magistrate's court as opposed to a Judge's court.

Because plaintiff submitted numerous evidentiary materials in opposition to defendant's motion to dismiss, the court treated that motion as one for summary judgment, as is provided by Rule 12(b), Fed. R. Civ. P. In fact, the plaintiff, himself, on August 13, 1984, asked that summary judgment be granted in his favor.

Rule 56(c) of the Civil Rules provides that summary judgment may be granted 'if the pleadings...together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' For purposes of defendant's motion, this court assumed that all facts alleged in plaintiff's pleadings and other materials were true. It is for that reason that no trial or other hearing was held. The purpose of a trial is to resolve disputed issues of fact, of which there were none in this case.

The sum and substance of the court's August 24th decision was that even if the defendants had violated some duty under state law that conferred a due process right upon plaintiff, that conduct was protected by the immunity doctrine as a matter of law. Accordingly, the court will deny plaintiff's motion for reconsideration.

Plaintiff has also requested, in the event that the instant motion was denied, that he be permitted to amend his complaint. Other than deleting Mr. O'Donnell as a defendant 'if it is not detrimental to plaintiff's case,' he has already clearly presented the facts upon which he bases his 'case.' The defendants have raised an absolute defense to that case. While mindful of the admonition in Rule 15(a) Fed. R. Civ. P., that leave to amend should be 'freely given when justice so requires,' the plaintiff has failed to even suggest

the nature of substance of any other facts or legal theories to which the defendants' immunity would not pertain.

IT IS THEREFORE ORDERED that plaintiff's motion for reconsideration is hereby DENIED.

Dated at Milwaukee, Wisconsin, this 13th day of September, 1984.

BY THE COURT

AARON E. GOODSTEIN
U.S. MAGISTRATE

APPENDIX G

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

JOHN C. SCARVACI,
Plaintiff,

v.

FREDERIC MATESTIC, et al.
Defendants.

Oct. 9, 1984

NOTICE OF APPEAL

Case. No.
84-C-752

Notice is hereby given that plaintiff, above named, hereby appeals to the United States District Court of Appeals for the Seventh Circuit from the final judgment entered in this action on the 13th day of September, 1984.

Dated and signed this 9th day of October, 1984, in Milwaukee, Wisconsin.

JOHN C. SCARVACI, pro se
910 East Calumet Road
Milwaukee, Wisconsin
53217

APPENDIX H

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

JOHN C. SCARVACI,
Plaintiff-Appellant

May 24, 1985

v.

FREDERIC MATESTIC, Assistant District Attorney, E. MICHAEL McCANN, District Attorney and WILLIAM F. O'DONNELL, County Executive of Milwaukee County,
Defendants-Appellees

Case No. 84-2728

Appeal from the United States District Court for the Eastern District of Wisconsin.

No. 84-C-752

Aaron E. Goodstein, Magistrate

ORDER

On June 11, 1984, John C. Scarvaci filed a complaint alleging that Assistant District Attorney for Milwaukee County, Frederic Matestic, District Attorney E. Michael McCann and Milwaukee County Executive William F. O'Donnell had violated his civil rights. Specifically, Scarvaci maintained defendants violated his Fourteenth Amendment due process rights by failing to criminally prosecute

James Tall, an individual Scarvaci maintains defrauded him by wrongfully transferring property in which he held a security interest. 1/ On agreement of the parties, the suit was referred to a United States Magistrate. Defendants filed a Motion to Dismiss pursuant to Rule 12(b)6 of the Federal Rules of Civil Proceedure. The magistrate construed the motion as one for summary judgment 2/ and granted summary judgment in defendants' behalf. Scarvaci appeals. We affirm.

In the interest of fostering independence in prosecutorial performance, a district Attorney is afforded absolute immunity for decisions and actions taken in the course of his employment as a prosecutor. Imbler v. Pachtman 424 U.S. 409 (1976). Thus,even assuming Scarvaci's allegations true,3/ it is clear, as a matter of law, that both McCann and Matestic are absolutely immune to civil process. The decision not to prosecute a case, like the decision to prosecute, is committed

to the prosecutor's discretion and thus falls squarely within the range of absolutely protected conduct. Dohaish v. Tooley, 670 F.2d 934, 938 (10th Cir.), cert. denied, 459 U.S. 826 (1982).4/ See also Curry v. Jensen, 523 F.2d 387, 388 (9th Cir.), cert. denied, 423 U.S. 998 (1975).

It is also clear that plaintiff's complaint does not state a cause of action against O'Donnell. To begin, Scarvaci makes no specific allegations against O'Donnell. Further, liability for the violation of civil rights cannot be premised solely on a theory of vicarious liability or respondeat superior, Adams v. Pate, 445 F. 2d 105, 108 (7th Cir.), cert. denied, 400 U.S.1024(1971); a civil rights plaintiff must show an affirmative link between the alleged wrong and wrongdoer. Id. Pro se pleadings are liberally construed, Haines v. Kerner, 404 U.S. 519 (1972), and thus court has held that pro se civil rights pleadings are sufficient where the

defendant's personal responsibility might logically be inferred from the nature of that defendant's official duties. Duncan v. Duckworth, 664 F.2d 653,655 (7th Cir. 1981). See also Wellman v. Faulkner, 715 F.2d 269 (7th Cir. 1983), cert. denied, 104 S. Ct. 3587 (1984)(personal responsibility of senior prison official would not br presumed beyond pleading stage). However, in the absence of specific allegations against O'Donnell and in light of the attenuated link between the officials of the District Attorney and the County Executive, we will not infer defendant O'Donnell's personal responsibility.

The order of the district court granting defendants' summary judgment is AFFIRMED.

1/ Scarvaci sold Tall his printing business under a ten-year contract whereby he retained a security interest in the machinery and equipment. Apparently in 1980, Tall defaulted on the contract; Scarvaci then learned that Tall had sold the encumbered property. Tall subsequently filed for bankruptcy. In May, 1981, Scarvaci received a default judgment against Tall but was unable to collect his judgement.

2/ Rule 12(b) provides:

If, on a motion asserting the defense numbered(6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

3/ On a motion for summary judgment, all facts are construed in favor of the non-moving party. Janowiak v. City of South Bend, 750 F.2d 557 (7th Cir. 1984).

4/ Wis. Stats.#59.47, which Scarvaci cites as support for his position, simply sets forth the duties and obligations of a district attorney. It does not require tha district attorney to pursue criminal prosecution in all cases. Nor does the provision waive the immunity of Wisconsin's district attorneys.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

JOHN C. SCARVACI,
Plaintiff-Appellant,

No. 86-2931

v.

FRED MATESTIC, Ass't. Dist. Attorney, et al.
Defendants-Appellees

NOTICE OF APPEAL

U.S. District Court
E. Dist.of Wisconsin

Case 84-C-752
Judge
Thomas J. Curran

Notice is hereby given that Plaintiff-Appellant, above named, hereby appeals to the United States Supreme Court, from the ORDER of the U.S. Court of Appeals for the Seventh Circuit, denying the-MOTION FOR RECONSIDERATION OF ORDER DENYING WRIT OF ERROR-filed on March 3, 1987 and denied on April 1, 1987.

Plaintiff-Appellant claims that the Judgment Order is in direct conflict with Federal legislation Title 42 U.S.C. #1983, and also Article III, Sec. 2, of the Constitution of the United States.

Dated and signed this 5 day of May 1987, in Milwaukee, Wisconsin.

John C. Scarvaci

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